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GAN CHIEW HEANG & ORS

v.

UNIVERSAL TRUSTEE (M) BHD & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
BALIA YUSOF WAHI J
[SUIT NO: S7-22-591-2002]
18 OCTOBER 2010

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SUCCESSION: *Administration - Action for accounts - Estate administered by trust corporation - Whether administrator guilty of fraudulent concealment of information and wilful default - Concurrent action against son of deceased for intermeddling with assets of estate and converting them to own use - Whether charges against administrator and deceased's son made out*

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The 12 plaintiffs in this action, comprising the wives and children of a wealthy businessman who died intestate, were among 19 beneficiaries under the deceased's estate ('the estate'). The first defendant, a trust corporation, was the trustee-cum-administrator of the estate. The second defendant was a son of the deceased who took over his late father's

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place in numerous investment holding companies that held the assets of the estate. The plaintiffs sued the first defendant for (i) the production of a true and perfect account of the estate (ii) an inquiry into the undistributed part of the estate and the distribution of the remaining assets and (iii) general, special, exemplary and aggravated damages. As

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against the second defendant, the plaintiffs alleged he was an executor *de son tort* and sought an account from him of the profits he had obtained from the estate. The plaintiffs alleged the first defendant had *inter alia* breached fiduciary duties, fraudulently concealed information relating to the estate, was responsible for missing assets and was guilty of wilful default. It was also alleged that the administration of the estate

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had been unduly delayed as full distribution of the assets to the beneficiaries had not taken place despite more than 20 years since the Letters of Administration was extracted. In a prior separate action, the plaintiffs had obtained a court order against the first defendant to produce an account of the estate. The first defendant did produce such

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an account for the period 1988-1998 but the plaintiffs were still dissatisfied and maintained that the account was deficient and inaccurate. As against the second defendant, the plaintiffs alleged that soon after the deceased's death, he had improperly assumed executorship of the estate, intermeddled with its assets and converted them to his own use or taken

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advantage of his position for personal benefit.

Held (dismissing plaintiffs' claim against defendants with costs to be taxed):

(1) The plaintiffs had failed to prove any fraud on the part of the first defendant in the administration of the estate. There was also insufficient evidence to prove the first defendant was guilty of wilful default, *mala fide*, misconduct, concealment of information or missing assets. (paras 18 & 20)

(2) The courts will always be reluctant to interfere with the discretion of the executor to administer the estate unless there was evidence of actual fraud or misconduct on the administrator's part or if there was evidence of *mala fide* or some other evidence or special circumstance showing misdirection on the part of the administrators as trustees in carrying out their duties. (para 18)

(3) There was no evidence of concealment of information or missing assets as alleged by the plaintiffs. The beneficiaries were kept informed through memos and meetings were held and distributions made as soon as the grant of the administration was granted and extracted. The beneficiaries were accessible to expert advice from lawyers, accountants and tax advisers. These experts had been with them on the relevant matters. (para 20)

(4) The first defendant had complied with an earlier court order to produce an account of the estate. Pursuant to another order, it had filed an affidavit setting out the accounts or the assets of the estate while another judge had made an interim order for distribution of the assets. In the circumstances, the plaintiff's application for a true and perfect account was misconceived and groundless and their prayer for an inquiry into what parts of the estate were outstanding was purely speculative and had no merit. (para 22)

(5) There was insufficient ground to hold that the second defendant was an executor *de son tort* and liable as such. (para 25)

[The first defendant to distribute the remaining assets of the estate within one month of the order.]

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors [1984] 4 AMR 3904 ***(refd)***

Fong Ah Tai & Ors v. Fong Yoon Heng & Anor [2004] 1 LNS 233 HC ***(refd)***

Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming Philip [1996] 2 CLJ 380 PC ***(refd)***

Sivanendran V Markandoo & Anor v. Dr Mahendran V Markandoo [1988] 1 CLJ 480; [1988] 1 CLJ (Rep) 274 SC ***(refd)***

Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal [2009] 2 CLJ 363 CA ***(refd)***

Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(refd)***

Legislation referred to:
Limitation Act 1953, ss. 22(1), 29

Other source(s) referred to:
Theobald on Wills, 16th edn, p 526

For the plaintiffs - Su Tiang Joo (Peter Justin Skelchy & William Foo with him); M/s Cheah, Teh & Su

For the 1st defendant - Leong Wai Hong (Claudia Cheah Pek Yee, Ng Chian Huey & Wang Shue Wen with him); M/s Skrine & Co

For the 2nd defendant - Surinder Singh (Kho Yieng San with him); M/s Ong & Manecksha

Reported by Ashok Kumar

JUDGMENT

Balia Yusof Wahi J:

Background

[1] The late Yeap Hock Hoe died intestate on 14 May 1980. At the time of death, the deceased was then the Chairman of the Ban Hin Lee Bank ("BHLB"), which bank was founded by the deceased's late father. The Yeap family was a prominent and prosperous family, very well-known in Penang and owned many assets and businesses. The first three plaintiffs are the lawful spouses of the deceased. The 4th to the 12th plaintiffs are the lawful children. Together they comprise 12 out of 19 beneficiaries to the Estate of Yeap Hock Hoe (hereinafter referred to as the Estate), deceased.

[2] The first defendant is a trust corporation who in 1985 applied for and was granted Letters of Administration to the Estate in 1986 and extracted the same in 1988. It is the trustee *cum* administrator of the Estate.

[3] The second defendant is one of the sons of the deceased. Immediately after the death of the deceased, he was co-opted to fill the seat left by his deceased father in numerous investment holding companies that hold the assets of the Estate.

[4] The plaintiffs are suing for a true and perfect account of the Estate and to have the Estate finally administered. They are also suing for an account from the second defendant as an executor *de son tort*.

Issues And Contentions

[5] The two main issues as found by the court are as follows:

(i) Whether the first defendant, the trust corporation, Trustee *cum* Administrator failed to render clear, proper and accurate accounts for the Estate?

(ii) Whether the second defendant dealt with and/or administered the assets of the Estate as to render him liable to account to the beneficiaries as an executor *de son tort*?

[6] Against the first defendant, the plaintiffs are seeking for the production of a true and perfect account of the Estate and for an inquiry into the outstanding part of the Estate if any and for the distribution of the remaining assets of the Estate. The plaintiffs are also claiming for general, special, exemplary and aggravated damages. Against the second defendant and the plaintiffs are seeking for an account of the Estate in his capacity as the executor *de son tort* and to account for the principal, interest and profits obtained by him from the Estate.

[7] The plaintiffs' cause of action against the first defendant is basically premised on breach of fiduciary duties which are particularised in para. 22 of the plaintiffs' statement of claim, wilful default and in the alternative for fraudulent concealment of information relating to the Estate (paras. 25 and 31 of the statement of claim).

[8] In advancing their case against the first defendant, the plaintiffs are contending that the same has been acting in a dilatory manner. The first defendant was appointed an administrator of the Estate on 20 May 1984 and letters of administration was granted on 7 January 1986 and the grant of the letters of administration was issued on 11 May 1988. Despite twenty over years has gone by, still no proper and accurate account of the Estate has been produced by the first defendant. The first defendant has also failed to make full distribution of the assets of the Estate to the beneficiaries despite the numerous requests made and the first defendant is further accused of wasting the assets of the Estate citing the sale of a Rolls Royce car for a much lesser value than its actual value as an example. The plaintiffs has also initiated action against the first defendant *vide* Penang High Court Originating Summons No. 24-784-1998 and obtained an order dated 3 August 1999 ordering

the first defendant to produce an account of the Estate. The first defendant subsequent to the said order produced an account of the Estate for the period of 1988 - 1998. The plaintiffs claim that the account produced is a qualified account and therefore it was in breach of the said court order as it was the statutory duty of the first defendant to produce a true and perfect inventory of the Estate and that the duty of the first defendant relates back to the time of the deceased's death in 1980. Thus an action for committal against the first defendant was initiated but was dismissed by the court on 8 February 1999.

[9] The plaintiffs has also engaged PriceWaterhouse Coopers to do the accounts of the Estate and PW4, the executive director of the same produced a report of an account in exhs. P18 and P19 stating that the account prepared by the first defendant is inaccurate and does not give a true reflection of the Estate.

[10] Against the second defendant the plaintiffs are alleging that he is an executor de son tort in that he has without lawful authority dealt with and administered the assets of the Estate and personally acknowledged the executorship of the Estate. He was the director of Penang Tin Mining Company Sdn Bhd (PTMC) and Yeap Hock Hoe Holdings (YHHH) and has breached his fiduciary duties by placing himself in a conflict of interest situation namely between his own interest and the duties imposed upon him in respect of the companies and the Estate. Alternatively it is contended that the second defendant, as a constructive trustee has breached his duties and converted to his own use of the assets of the Estate for his own advantage. The second defendant took an unduly long period of time to appoint the first defendant as the administrator of the Estate but has appointed himself as the director of PTMC just six days after the death of the deceased. This according to the plaintiffs are instances indicating that the second defendant has taken advantage and benefitted himself while acting as executor de son tort and intermeddling with the assets of the Estate. In so far as the alleged shortfall in the account of the Estate as shown by the report of Messrs PriceWaterhouse Coopers, no explanation was forthcoming from the second defendant whom according to the plaintiffs should be accountable for.

The Evidence

[11] The plaintiffs' case relies mainly on the evidence of PW4 and PW3 and most of the other witnesses of the plaintiffs took the common stand and gave the common evidence that since the death of the deceased nothing much was made known about the account of the Estate and having the belief that the first and second defendants have

breached their duties. They are the first, third, fifth and sixth plaintiffs. PW3 is the fourth plaintiff, while PW4 is the Executive Director of PriceWaterhouse Coopers. The evidence of PW3 states that very soon after the death of the deceased, the second defendant assumed the executorship of the Estate and was referred to the "legal representative of the Estate of Yeap Hock Hoe Deceased" in various communications with the accountant firm of Messrs Sam Ah Chow and also in letters with the Inland Revenue Department which referred to him as the 'wakil sah Harta Pusaka Dato Yeap Hock Hoe' and various other communications in the companies belonging to the deceased. PW3 also gave evidence on the alleged misuse of company's fund belonging to PTMC and the sale of shares of Ban Hin Lee Bank owned by the Estate as instances where the second defendant has breached his duties and acting in conflict of interest. As against the first defendant, her evidence goes to show the failure of the first defendant to expeditiously and diligently distribute all the assets of the Estate and to render a proper account of the Estate. Her evidence goes further to show that the first defendant has not been acting in the best interest of the beneficiaries of the Estate by ignoring the beneficiaries' requests for information and by doing piecemeal distribution and alleged that the beneficiaries has been kept in the dark as to the affairs of the Estate for the past twenty-five years or so.

[12] PW4, the Executive Director of PriceWaterhouse Coopers who led the investigation team in preparing the report in exh. P18 and P19 stated that the objective of the report was to determine discrepancies or shortfalls in the administration of the Estate. This report concludes that there were shortfalls and generally states that some shares are not included in the audited accounts prepared by the first defendant while some other shares may have been sold at under value and others purchased or sold for no known reason and pursuant to any known instructions.

[13] PW9 who is the sixth plaintiff in this case gave evidence against the second defendant by stating that as she was only 20 years old at the time of the deceased's death and residing abroad, she trusted the second defendant fully and never questioned his actions and followed every instructions given to her by the second defendant and one Leong Weng Choon a very good worker of the deceased and closely associated with the deceased's business and family. So trusting of her with the second defendant that makes her simply sign any document and even without knowing it. So is the evidence of PW6, who is an adopted member of the family and one of the executors of the Estate of Madam Lee Cheng Kin. PW6 claimed he never questioned

A the second defendant about the administration of the Estate and neither was he made known about the accounts of the Estate nor was he ever aware that the Estate of Lee Cheng Kin forms part of the Estate of Yeap Hock Hoe. Like PW9, he also trusted the second defendant so much and followed his every instruction including signing whatever
B documents given to him without even knowing or reading it.

[14] DW1 and DW2 gave evidence for the first defendant. DW1 was the senior manager of the first defendant between 1983 to 1988. He dealt with the second defendant and one Leong Weng Choon who represented they had the authority from the family and had consulted
C the first, second and third plaintiffs and their children. The first three plaintiffs are the heads of family from the three wives of the deceased. Distribution was made soon after the extraction of the letters of administration in 1988. Partial grant was extracted on 11 May 1988 and final grant on 10 October 1997. According to DW1, initially the book
D value of the assets of the Estate was no more than RM2 million although the Second defendant estimated it to be around RM10 million. In administering the Estate, the first defendant has taken all the necessary steps such as identifying the assets, valuing the assets, conducting regular meetings with the second defendant and Leong Weng
E Choon as representatives of the family. With regard to the sale of the shares advice were also sought from the legal firm of Skrine & Co as well as Syarikat Goh Guan Hoe and the plaintiffs were fully aware of the transactions and approve it. It is also evident that the 7th, 8thd and 9th plaintiffs were among the buyers of the Ban Hin Lee Bank shares.

F **[15]** DW2 who took over the functions and duties of DW1 in 1988 testified that all the 12 plaintiffs have agreed to the appointment of the first defendant. The beneficiaries were kept informed and many meetings were held and memos and queries from the beneficiaries were attended to and at times access to documents were also given. DW2 stated that
G the total book value of the assets of the Estate was RM4 million. Distribution of the assets were made as early as 1988 right up to 2005 which among others include the deed of family arrangement made between the beneficiaries way back in September 1988.

H **[16]** On the specific allegations of the plaintiffs on the shares and the shortfalls, DW2 testified that some of the shares in particular the Island & Peninsular shares had already been disposed off by the deceased during his lifetime and the acquisition of a right issue is at the administrators' discretion, in which, the best interest of the beneficiaries and the Estate was always the main consideration of the first defendant.
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DW2 denies any shortfall in the accounts prepared by the first defendant and noted that the reports made by the plaintiffs merely indicate or allege 'possible shortfall' and nothing was proven.

[17] The second defendant denies any intermeddling with the assets of the Estate and denies he was ever the executor of the Estate. Any decision on the matter relating to the Estate was done with the knowledge and involvement of the members of the family, with the advice of the legal firm Syarikat Goh Guan Ho and Peat Marwick Mitchell & Co as the accountant. In respect of the company YHHH he stated that the company was liquidated with the agreement of all the beneficiaries and advances were made to the first, second, third, fourth, fifth and sixth plaintiffs. As to the directorship of PTMC and the alleged misappropriation of the said company's fund, he has already been absolved by the High Court Penang in suit no. 22-362-1997. The second defendant further reiterated that the families are well represented in the Board of PTMC and YHHH with many of the plaintiffs sitting in the board of the companies. Disbursements of funds were made with the consent, knowledge and approval of the directors and shareholders.

Findings By The Court

[18] Besides alleging that the first defendant is guilty of willful default, the plaintiffs are also alleging that the first defendant is guilty of fraudulent concealment of information relating to trust documents in the Estate. The plaintiffs have listed out in para. 31 of their statement of claim the particulars of such allegations. On the evidence adduced, it is my considered view that the plaintiffs has failed to prove any fraud on the part of the first defendant in the administration of the Estate. Fraud must be proven beyond reasonable doubt and the evidence adduced before this court is insufficient to meet the standard of proof required for that purpose. On the allegation of wilful default, it is trite that the courts will always be reluctant to interfere in the discretion of the executor to administer the Estate unless there is evidence of actual fraud or misconduct on the part of the administrator. Alternatively the court must also be shown that there is evidence of *mala fide* or some other evidence or special circumstances showing misdirection on the part of the administrators as trustees in carrying out their duties. In *Sivanendran V Markandoo & Anor v. Dr Mahendran V Markandoo* [1988] 1 CLJ 480; [1988] 1 CLJ (Rep) 274; [1988] 2 MLJ 169, the Federal Court held at p. 169:

> [2] a strong *prima facie* case is required to induce a court to grant an interlocutory injunction against an administrator or administratrix of an Estate and thereby displacing his/her authority. There must be some evidence of actual misconduct or fraud or immediate

A danger of loss, for the court is reluctant to interfere with the work of an administrator or administratrix except in special circumstances.

In the case of *Lee Ah Ngan & Anor v. Lee Kow* [1994] MLJU 347, Arifin Zakaria J (as he then was) stated:

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Sebagaimana dikatakan oleh penulis buku *The Law of Succession Testate and Intestate* Sixth Edition di muka surat 255:

> The Court ought not, in the exercise of its general equitable jurisdiction, to interfere with the discretion of trustees or
C personal representatives in the absence of *mala fides* or some other special circumstances showing grave misdirection of themselves by the trustees or personal representatives.

Saya tidak nampak sebarang sebab kenapa Mahkamah harus campur tangan di dalam kuasa budibicara wasi-wasi di dalam keadaan kes ini.
D Pihak Responden di dalam affidavitnya tidak pernah mencadangkan bahawa terdapat niat buruk (*mala fides*) Pemohon atau apa-apa sebab lain yang memerlukan campur tangan Mahkamah.

[19] In *Theobald on Wills*, 16th edn, it was stated at p. 526:

E Where a large discretion is conferred upon trustees, the court will not interfere with the exercise of the discretion so long as it is honestly exercised. It matters not whether the discretion is expressed in the form of a trust or of a power.

As an administrator of the Estate, the first defendant is in law a
F constructive trustee. (See: *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal* [2009] 2 CLJ 363, *Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming Philip* [1996] 2 CLJ 380).

[20] The evidence against the first defendant's breach of its duty is sought to be compounded by the evidence of PW4, in particular the
G investigation report made by Messrs PriceWaterhouse which alleges inconsistencies and throw some doubts to the figures produced by the first defendant's statement of accounts on the Estate. Having considered the report produced by PW4 in exh. P18 - and the oral testimonies of the plaintiffs' witnesses, I find there is insufficient evidence to prove any
H wilful default, *mala fide* or misconduct on the part of the first defendant in the administration of the Estate. It further strikes my mind that there are altogether twenty beneficiaries of the Estate but of these, only the plaintiffs are the disgruntled ones. It also strikes me that there is a certain degree of suspicion and discontentment between the family
I members from the different wives of the deceased. I do not find any evidence of concealment of information or missing assets as alleged by

the plaintiffs. The first defendant's witness who came to the fore, state in no uncertain term that the beneficiaries were kept informed through memos and meetings were held and distributions made as soon as the grant for administration was granted and extracted. The beneficiaries were accessible to expert advice from Syarikat Goh Guan Hoe, Peat Marwick Mitchell & Co and Messrs Sam Ah Chow comprising of lawyers, accountants and tax advisers. These experts have been with the beneficiaries and advising them on the relevant matters. It is incumbent on the part of the plaintiffs as beneficiaries of the Estate to prove what the missing assets are and the information that has been concealed by the first defendant. They have not given any. I note that the report by KPMG in exh. P18 merely alleged that there is a possible shortfall in the Ban Hin Lee Bank shares. DW2 in his evidence has given an explanation to this and I accept that explanation. The alleged shortfall in the Central Amalgamated shares was explained in the letter to Messrs Ghazi & Lim at pp. 193 - 196 of bundle A while some of the OCBC shares were held in Yeap Bros Ltd belongs to the Estate of Lee Cheng Kin and was passed to the Estate.

[21] On the issue of failure to account on the part of the first defendant, it is my finding that the account of the Estate has already been provided by the first defendant pursuant to the court order made in suit no. 24-784-1999. The said account is produced as per volume A7 of the bundles of document tendered in this case. I am in full agreement with the plaintiffs' contention that one of the basic duties of all executors or trustees is to render a clear and accurate account, for it is only through proper and accurate account that the beneficiaries have the means of knowing whether the Estate is being properly administered. (See: *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [1984] 4 AMR 3904, *Fong Ah Tai & Ors v. Fong Yoon Heng & Anor* [2004] 1 LNS 233).

[22] Quite obviously the plaintiffs are not satisfied with this account and sought for an order of committal against the defendant alleging the same has not complied with the court order. The plaintiffs' application was dismissed by the court. What the plaintiffs are asking for now is for a true and proper account of the Estate as prayed in para. 38.1 of the statement of claim. In my view, for all intents and purposes, the first defendant has complied with the court order and an account of the Estate has been produced by the first defendant. What more is there to be produced by the first defendant? Further, it is also in evidence that at one juncture, Justice Kang Hwee Gee who was among the many judges who had handled this case has also made an order for an affidavit to be filed setting out the accounts or the assets of the Estate.

The affidavit dated 27 October 2007 by one Burhanuddin b Ahmad Tajuddin has been filed in this court but was never produced as an exhibit by the parties in the course of the trial although both parties did make reference to the same. I further note that even as early as 2002, Justice Azmel, another judge who had a hand in this matter has made an interim order of distribution of the assets. The said order made on 22 October 2002 was appealed against and the appeal has been dismissed. Taking the totality of the facts and circumstances of the case, I am of the view that the plaintiffs' application for a true and perfect account is misconceived and groundless. In the same vein I also hold that their prayer for an inquiry into what parts, if any of the Estate are outstanding is purely speculative in nature and has no merits.

[23] On the allegation of delay, this court is mindful of the fact that the deceased died in 1980. The first defendant was appointed as an administrator on 29 May 1984. The petition for letters of administration was made on 23 October 1985 and letters of administration was granted on 7 January 1986. The grant for the letters of administration was issued on 11 May 1988 and thereafter distribution of the assets starts. The deed of family arrangement was made between the beneficiaries in September 1988, very soon after the grant of letters of administration. It is also evident that a final grant was only extracted on 10 October 1997. At a first glance it does appear that the administration took such a long time. However, upon considering the evidence of the defence, DW2 explains that the Estate was encountering problem on the issue of Estate duty and also involves and related to some issues in the Estate of Lee Cheng Kin. In this instance it was also explained that the assets referred to as the landed properties at Claimant Place, Cantonment Road and Love Lane were included in the list of assets very much later just prior to the extraction of the final grant. In so far as the first defendant is concerned, by the term of their appointment it is clearly understood that they have the full discretion to sell the assets if the circumstances so require. In respect of these assets, rental income were earned and when they were finally disposed off, a much higher value was fetched and that I suppose, was beneficial to the Estate.

[24] On the totality of the evidence, I find that the distribution of the assets of the Estate has been made all along and over the years. On 29 October 2007 Justice Kang Hwee Gee has also made an order indicating that the assets has been fully administered and that the remaining assets were only about RM300,000. The said order stipulates that RM500,000 out of the RM887,000 worth of assets be distributed to the beneficiaries of the Estate. It is also pertinent to note that before making the order on 29 October 2007, Justice Kang Hwee Gee had on

9 August 2007 given directions for the plaintiffs to prepare a list of assets which the plaintiffs allege has not been accounted for and the first defendant to file an affidavit. The plaintiffs has failed to do that and instead had asked for RM500,000 out of RM887,000 worth of assets identified by the first defendant be distributed. In the circumstances, it is my view that the plaintiffs' contention of the first defendant being guilty of wasting the assets of the Estate and failing to make distribution is without merits and goes against the evidence adduced.

[25] I shall now consider the case against the second defendant. It is alleged by the plaintiffs that the second defendant is an executor de son tort. In so far as the evidence goes it was put forth that the second defendant assumed the directorship of his late father's company quite immediately after the deceased's demise. There is also the further evidence and allegation of the second defendant holding out as an executor of the Estate in particular in the various communications between him and some other parties including the income tax office. I note that there are letters from the income tax department addressing the second defendant as the "wakil sah Harta Pesaka Datuk Yap Hock Hoe" and also letters from Sam Ah Chow & Co, the accountant, addressing him as the legal representative of Estate of YHH. In my view, assuming the directorship of the deceased's company per se did not make the second defendant as an executor of the Estate. The deceased has a number of families and each family is represented with the second defendant as a representative of one of the families. It is further established that the families are all represented in the companies of the deceased after the death. There were no complaints at all regarding this matter. Exhibits D3 and D6 are the various resolutions and the letters in bundle A1 at pp. 311, 312, 314, 316, 318, 320, 322, 324, 326, 327, 328, 334, 337 and 339 are all documents indicating that the second defendant and the other representatives of the families were in communication with various other parties dealing with the assets of the companies of the deceased. The other parties referred to are Syarikat Goh Guan Ho, a legal firm, Messrs Peat, Marwick, Mitchell & Co, Sam Ah Chow & Co, an accountant and the banks, to name a few. An executor de son tort is one who takes upon himself the office of an executor or intermeddles with the goods of the deceased person without having been appointed an executor by the testator's last valid will or by a codicil to that will, or without having obtained a grant of administration from a competent court. (*Halsbury's Law of England*, para 2 vol. 17(2) Fourth Edition Reissue). On the facts and circumstances and on the totality of the evidence, I do not find sufficient ground to hold that the second defendant is an *executor de son tort* and being liable as such.

[26] In so holding, I have also taken into consideration the two suits filed against the second defendant in the Penang High Court by Penang Tin Mining Company Sdn Bhd (PTMC) and Yap Hock Hoe Holdings Sdn Bhd (YHHH). The plaintiffs now are claiming that the second defendant has improperly obtained advances, drawings or obtained loans in cash and/or shares from both PTMC and YHHH and has also converted to his own use the assets of the Estate. These loans or advances are prohibited and were approved by the second defendant himself and that they were also unsecured and interest free. Thus the second defendant has mismanaged PTMC and YHHH to his own advantage and to the detriment of the interests of the plaintiffs in the Estate. In respect of the contention, I am in full agreement with the second defendant's contention that this issue has been dealt with by the Penang High Court in the abovementioned two suits and therefore it is *res judicata*. In both suits the defendants were sued for breach of fiduciary duties and/or breach of duty as a constructive trustee and liable to account for the benefits and/or profits derived by the second defendant from the said two companies. In the circumstances, I hold that the matter should be put to rest and the plaintiffs should not be allowed to relitigate the matters in the present suit.

[27] On the specific issue of the disposal of 270,000 units out of 350,000 shares of Ban Hin Lee Bank, it is established that the shares belong to the Estate of Lee Cheng Kin. The second defendant was the executor of the said Estate. The plaintiffs are claiming that the said sale purportedly to raise cash for the Estate of Yap Hock Hoe to subscribe for new shares constituted a breach of trust and/or a conflict of interest on the part of the second defendant. I pause here to note that all the plaintiffs were informed of the sale and given an opportunity to purchase the same. However only the seventh, eighth and ninth plaintiffs took up the offer and among them bought 120,000 out of the 270,000 shares offered. It is not disputed that the sale was made at the market price of RM2.03 per share at that point of time. In the circumstance it is not open to the plaintiffs to allege any impropriety on the part of the second defendant in dealing with the same. In any event it is not proven that the Estate has suffered any loss. Again, I must stress that this court should not be too ready to interfere with discretion of the administrator in the absence of any proof of actual misconduct or fraud committed by him. The authorities are clear that fraud and conspiracy to defraud must be proved beyond reasonable doubt and fraud must be actual fraud. Suspicion however strong is insufficient to prove fraud (see: *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* [1997] 3 CLJ 854, *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1).

[28] Before concluding, I must deliberate on the issue of limitation which according to the defendant's view, this action is time barred. My very short answer to the issue raised is simply that by virtue of ss. 22(1) and 29 of the Limitation Act 1953, the plaintiffs' action against the defendants is not time barred. I do not find it necessary to reproduce those two provisions here.

[29] In conclusion, for the aforesaid reasons stated above, the plaintiffs' claim against both the defendants is hereby dismissed with costs to be taxed. This court also makes a further order that the remaining assets of the Estate still in the hands of the first defendant be distributed within one month of this order.